Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

Guideline Sentencing Update will be distributed periodically by the Center to inform judges and other judicial personnel of selected federal court decisions on the sentencing reform legislation of 1984 and 1987 and the Sentencing Guidelines. Although the publication may refer to the Sentencing Guidelines and policy statements of the U.S. Sentencing Commission in the context of reporting case holdings, it is not intended to report Sentencing Commission policies or activities. Readers should refer to the Guidelines, policy statements, commentary, and other materials issued by the Sentencing Commission for such information.

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the author and not necessarily those of the Federal Judicial Center.

VOLUME 6 • NUMBER 13 • MAY 27, 1994

Criminal History

CHALLENGES TO PRIOR CONVICTIONS

Supreme Court holds that defendant has no right to challenge prior conviction used to enhance sentence under 18 U.S.C. § 924(e) unless right to counsel was denied. Defendant was convicted of possession of a firearm by a felon and subject to a mandatory minimum sentence of fifteen years under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), because he had three prior state convictions for violent felonies. He challenged two of the convictions, claiming ineffective assistance of counsel and that his guilty pleas were not knowing and voluntary. The district court held there was no statutory right to challenge the prior convictions and no constitutional right to challenge except for complete denial of counsel. The Fourth Circuit affirmed, adding that constitutional challenges may be allowed "when prejudice can be presumed from the alleged violation," but not, as here, when the violation "necessarily entails a fact-intensive inquiry." *U.S. v. Custis*, 988 F.2d 1355, 1363–64 (4th Cir. 1993).

The Supreme Court also affirmed, finding first that nothing in § 924(e) authorizes collateral attacks. "The statute focuses on the fact of the conviction and nothing suggests that the prior final conviction may be subject to collateral attack for potential constitutional errors before it may be counted." The Court also held that the Constitution requires that challenges be allowed only for a complete denial of counsel, not for claims such as defendant's. "Ease of administration" and an "interest in promoting the finality of judgments" were also cited by the Court. The Court recognized, however, "that Custis, who was still 'in custody' for purposes of his state convictions at the time of his federal sentencing under § 924(e), may attack his state sentences in Maryland or through federal habeas review. . . . If Custis is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences."

U.S. v. Custis, No. 93-5209 (U.S. May 23, 1994) (Rehnquist, C.J.) (three justices dissenting).

Note: Although this case concerns § 924(e) rather than the Guidelines use of prior convictions, some circuits have not distinguished between the two. *See, e.g., U.S. v. Medlock*, 12 F.3d 185, 187–88 n.4 (11th Cir. 1994) ("The rationale underlying our decision is equally applicable to both Sentencing Guidelines cases and those originating in . . . § 924(e)"); *U.S. v. Byrd*, 995 F.2d 536, 540 (4th Cir. 1993) (holding earlier decision in *Custis* "is controlling of our disposition" in challenge under Guidelines). *But cf. U.S. v. Paleo*, 9 F.3d 988, 989 (1st Cir. 1992) (in rejecting challenge under § 924(e), finding Guidelines cases inapposite because "Guideline provision arises in a different legal context and uses language critically different from" § 924(e)). This decision will also affect application of the Guidelines Armed Career Criminal provision, § 4B1.4, which applies to defendants "subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e)."

Outline at IV.A.3.

JUVENILE CONVICTIONS AND SENTENCES

U.S. v. Ashburn, No. 93-1067 (5th Cir. May 10, 1994) (Goldberg, J.) (Affirmed: District court properly held that prior conviction under Youth Corrections Act was not "expunged" for Guidelines purposes. The conviction had been "set aside" under the YCA, but "the 'set aside' provision should not be interpreted to be an expungement under § 4A1.2(j) in calculating a defendant's criminal history category. The Commentary to § 4A1.2(j) explains that convictions which are set aside for 'reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction,' are not expunged for purposes of this Guideline and can be included in Criminal History Category determinations. Because the YCA conviction here was set aside for 'reasons unrelated to innocence or errors of law,' it was properly utilized in the criminal history calculation."). *See also U.S. v. McDonald*, 991 F.2d 866, 871–72 (D.C. Cir. 1993) ("set aside" in D.C. statute similar to YCA is not "expunged" under Guidelines). *Contra U.S. v. Kammerdiener*, 945 F.2d 300, 301 (9th Cir. 1991) (conviction "set aside" under YCA was "expunged" under § 4A1.2(j)). *Cf. U.S. v. Doe*, 980 F.2d 876, 881–82 (3d Cir. 1992) (reversing denial of motion for expungement, holding "set aside" in YCA means "a complete expungement").

Outline at IV.A.4.

Sentencing Procedure

PLEA BARGAINING—DISMISSED COUNTS

U.S. v. Ashburn, No. 93-1067 (5th Cir. May 10, 1994) (Goldberg, J.) (Remanded: "Counts which have been dismissed pursuant to a plea bargain should not be considered in effecting an upward departure. . . . To allow consideration of dismissed counts in an upward departure eviscerates the plea bargain. Such consideration allows the prosecutor to drop charges against a defendant in return for a guilty plea and then turn around and seek a sentence enhancement against that defendant for the very same charges in the sentencing hearing. . . . We adopt the reasoning outlined by the Ninth Circuit that a sentencing court should not be allowed to violate the bargain worked out between the defendant and the government. . . . Consideration of dismissed counts as relevant conduct is explicitly allowed by the Guidelines. However, the bar to considering dismissed counts in making upward departures remains an important limitation in the modified real-offense sentencing approach of our current sentencing program. Allowing consideration of dismissed offenses would bring us much closer to the type of pure real-offense sentencing system explicitly rejected by the Guidelines.") (Davis, J., dissenting).

Outline at VI.B.2.b and IX.A.1.

Departures

Mitigating Circumstances

Third Circuit approves departure based on defendant's anguish at involving his son in fraud offense. Defendant tried to solve his company's cash-flow problems through false progress reports to receive accelerated payments from the government, and later did not return unearned payments that had resulted from mistaken double billing. In the first instance he had his son prepare reports to aid the scheme, apparently without the son's knowledge of the fraud. Defendant's efforts notwithstanding, the company eventually went bankrupt and the frauds were discovered. Defendant pled guilty to conspiracy to defraud the government, his son to aiding and abetting a false statement. The district court departed downward one level for defendant (allowing home confinement and probation instead of imprisonment), finding that the amount of loss calculated under § 2F1.1 overstated defendant's criminality and that the Guidelines did not account for the effect on defendant of having unintentionally caused his son to be convicted of a crime.

The appellate court remanded because the district court clearly erred by not imposing a more than minimal planning enhancement and failed to adequately explain the departure, but affirmed the grounds of the departure. While the government did suffer a large loss, the loss overstated defendant's criminality because defendant intended not to steal money but rather to expedite payments that would have eventually been due the company. And, without the takeover of his company and subsequent bankruptcy, "it is quite possible that the loss to the United States would have been far less."

"The other reason for the district court's departure was the mental anguish Monaco felt seeing his son, otherwise a law-abiding citizen with an excellent future, convicted of a crime because of his father's fraudulent scheme . . . [and thereby] stigmatized, not for deliberately committing a criminal act, but for dutifully and unquestioningly honoring his father's request. . . . In at least some cases, such as the district court found here, a defendant who unwittingly makes a criminal of his child might suffer greater moral anguish and remorse than is typical. . . . [W]e think the Sentencing Commission did not consider this issue when it promulgated the Guidelines.

"Moreover, we do not believe that by promulgating U.S.S.G. § 5H1.6, the Sentencing Commission foreclosed the possibility of a downward departure in this extraordinary situation. That section specifically states that family ties and responsibilities are 'not ordinarily relevant' for departure purposes. 'Not ordinarily relevant' is not synonymous with 'never relevant' or 'not relevant.' . . . In the unusual facts and circumstances of this extraordinary case, . . . it is entirely probable that Monaco never intended to criminalize his son and was deeply and legitimately shocked and remorseful when it happened. This is not something that is likely to occur frequently, and when it does, the interests of justice weigh more heavily against overpunishing the defendant than they do in favor of rigidly enforcing the Guidelines without regard for legitimate penological bases of sentencing." The court also noted that "the defendant is a productive, non-violent offender and a small downward departure would eliminate the need for incarceration entirely."

U.S. v. Monaco, No. 93-5261 (3d Cir. May 10, 1994) (Nygaard, J.).
Outline at VI.C.1.a and 4.a, VI.B.1.k.

U.S. v. Munoz-Realpe, No. 92-4039 (11th Cir. May 5, 1994) (Anderson, J.) (Remanded: For defendant who otherwise did not qualify for substantial assistance departure under § 5K1.1, it was error to depart downward under § 5K2.13 on the basis that his diminished capacity rendered him incapable of providing substantial assistance to the government. "[T]he Guidelines consider diminished capacity, but limit its relevance to the effect on the defendant's commission of the offense. Guidelines § 5K2.13 does not authorize consideration of the effect of a defendant's diminished capacity on his ability to provide substantial assistance." The case was remanded "for a determination whether Munoz-Realpe's mental incapacity contributed to the commission of his offense" sufficiently to warrant departure under § 5K2.13.).
Outline at VI.C.1.b, generally at VI.F.1.b.i

U.S. v. O'Brien, 18 F.3d 301 (5th Cir. 1994) (Remanded: Defendant's post-conviction community service, including musical performances and benefit shows, did not justify a downward departure. Defendant's activities reflect skills he developed as a professional musician, and educational and vocational skills and employment record do not support departure under §§ 5H1.2, 5H1.5, p.s.).
Outline generally at VI.C.4.b.

Substantial Assistance

U.S. v. Gerber, No. 93-5057 (10th May 9, 1994) (Ebel, J.) (Affirmed: It was not a violation of the Ex Post Facto Clause to apply stricter version of § 5K1.1 that was in effect when defendant attempted to provide substantial assistance, after Nov. 1, 1989, rather than the earlier version in effect when defendant committed her offenses. "Section 5K1.1 speaks to the assistance a defendant provides to the government, rather than the criminal conduct for which the defendant was convicted. Thus, the retroactivity analysis turns on which version of 5K1.1 was in effect when she participated in the numerous briefings with federal agents—not when she committed the unlawful conduct to which she pled guilty.").
Outline at I.E and VI.F.3.

Offense Conduct

Calculating Weight of Drugs

U.S. v. Munoz-Realpe, No. 92-4039 (11th Cir. May 5, 1994) (Anderson, J.) (Remanded: Defendant guilty of importing six liquor bottles containing a liquid that tested positive for cocaine base must be sentenced under guideline for cocaine hydrochloride rather than that for cocaine base. The Nov. 1993 amendment to § 2D1.1(c) (n.*) states: "'Cocaine base,' for the purposes of this guideline, means 'crack.'" Thus, the appellate court held, "forms of cocaine base other than crack are treated as cocaine hydrochloride." The court also held that it would use the new Guidelines definition in determining whether to apply a mandatory minimum sentence under 21 U.S.C. § 960(b), contrary to an earlier decision that all forms of cocaine base were included in § 960(b): "[W]e think it is proper for us to look to the Guidelines in the mandatory minimum statute, especially since both provisions seek to address the same problem. . . . There is no reason for us to assume that Congress meant for 'cocaine base' to have more than one definition." *But cf. U.S. v. Palacio*, 4 F.3d 150, 154 (2d Cir. 1993) (recognizing narrower definition of cocaine base for Guidelines, but stating amendment would not affect broader definition used for mandatory minimum sentences under 21 U.S.C. § 841(b)).).
Outline at II.B.3.